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IN THE

Supreme Court of the United States.

No. 452.

OCTOBER TERM, 1949.

JEREMIAH McCARTHY,

Petitioner,

v.

AMERICAN EASTERN CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTER STATEMENT OF THE CASE.

The Petitioner, Jeremiah McCarthy, was injured on June 16th, 1947 on board the Respondent's vessel "Gadsden". On August 25th, 1947 he instituted two suits against the Respondent. One was a civil action in which he sought damages. The other was a libel in admiralty seeking maintenance. His medical attention or "cure" had been furnished without cost to him.

The two cases were heard together. Petitioner's counsel requested the Trial Judge to instruct counsel for the Respondent that the question of maintenance was not to be mentioned before the Jury in the civil action. Nevertheless the Petitioner testified before the Jury in his damage

action that he had lost not only monetary wages but his board and lodging on board the vessel by reason of his disability. That evidence was elicited in the Petitioner's case in chief. The Jury awarded him substantial damages which the Trial Judge found were adequate to cover not only the loss of Petitioner's monetary earnings but also any loss he might have had by being deprived of board and lodging in his occupation as a seaman.

The District Judge refused to award maintenance under the circumstances, holding that it would be a duplication of the Petitioner's recovery to permit him to have an award for maintenance in his admiralty suit after having proved maintenance as one of the elements of his damages in his civil action.

The Court of Appeals affirmed.

ARGUMENT.

In his brief in support of the Petition, the Petitioner insists upon stating as his major premise the proposition that both decisions below are predicated upon the "hypothesis that the admiralty action for maintenance was upon the same cause of action as the civil suit for tort damages" (brief, 7).

That has never been the position of the Respondent nor is it the holding of either of the Courts below. The basis upon which the District Court and the Court of Appeals deny Petitioner recovery for maintenance is that since he recovered the value of his board and lodging in his action for indemnity, it would be a duplication of recovery to award it to him again in his admiralty suit for maintenance.

The Court of Appeals said: (slip opinion, 4)

> "For in the admiralty as elsewhere in the law a litigant may not recover compensation for a single claim more than once. The ancient rule in the admiralty that the vessel and her owner must provide an injured seaman with maintenance was intended to assure him three meals a day and a bed in which to sleep during his treatment and convalescence. There is no basis in logic or law for assuming that he may ask for six meals a day or twin beds, however."

The Petitioner seeks to assert conflict between that holding and this Court's decision in *Pacific S. S. Co. v. Peterson,* 278 U. S. 130. We will attempt to demonstrate that there is no conflict but in fact the Peterson Decision is in accord with the holding below.

Whether a second cause of action is barred is not determined by the relief which has been asked but whether the same evidence will support both causes of action. *Freeman, Judgments,* § 259; *In Re Samuels,* 263 F. 561. Estoppel by judgment is not dependent upon whether the same demand is made in both cases but it exists where the question has been previously concluded by a judgment between

the parties. The test of the identity of causes of action is the identity of the facts essential to maintain them. *City of New Orleans v. Citizens Bank of Louisiana,* 167 U. S. 371; *Munn v. Des Moines Nat. Bank,* 18 F. 2nd 269; *Hutchinson v. Sperry,* 1 F. 2nd 302. In the latter case the Court said:

> "While the first suit embraced several causes of action, we are unable to discover any legal distinction between one of these causes of action and the cause of action in this suit. Both arose out of the same controversy; both rested on the same facts; in both the same fradulent acts were charged; both were tried on the same record. *'The true test of the identity of causes of action is the identity of the facts essential to their maintenance.'* " (Emphasis ours.)

Neither the Petition nor the brief state with accuracy the question actually decided by the Court below nor even the question which was presented for decision to the Court below. Neither the Court of Appeals, the District Court nor this Respondent asserts that the Petitioner's "admiralty action for maintenance was upon the same *cause of action as the civil suit for tort damages*" (brief, 7—emphasis ours). The Respondent asserts and both of the Courts below have held that the monetary value of Petitioner's loss of board and lodging, i. e. his maintenance, was litigated in his civil suit for damages and he recovered it in that suit. That is the reason that he has been denied recovery in his admiralty suit for maintenance. To grant Petitioner recovery in his suit for maintenance would be to grant him recovery a second time for these same items.

To assert as this Court did in *Pacific S. S. Co. v. Peterson, supra,* that maintenance and *compensatory* damages are consistent and cumulative does not prove that "a particular item of his claim, such as maintenance, if recovered in one suit, may again be recovered in another" (Opinion below, R. 37). The Court below recognized that the recovery of a judgment for maintenance by a seaman would

not bar a subsequent suit by him for damages and that is all that the rule of the *Peterson Case* asserts.

It is noteworthy that the Petitioner does not cite to this Court a single case where any Court has sanctioned the double recovery which he seeks. A number of courts have considered the problem and with unanimity have taken the same position which was taken by the Court below.

In *Smith v. Lykes Brothers—Ripley S. S. Co., Inc.,* 105 F. 2nd 604, (CA 5), the Court had a somewhat similar situation before it. It could not decide the problem because the Record before it was inadequate, but it stated:

> "So the ultimate question comes to this: In the two cases is there duplication or overlapping of the same elements of expense resulting from one and the same injury? The principle that really applies is one either of payment or of estoppel by judgment, or both. The issue is whether or not the items of damage here involved were actually litigated and determined in the former case."

In *Muise v. Abbott,* 160 F. 2nd 590, (CA 1), a tort feasor other than the employer was involved. The seaman had been injured on the dock and settled with the dock owners. He then sued the shipowner for maintenance and cure. The Court of Appeals for the First Circuit said:

> "But it does not follow from this, as the Appellant contends, that he can recover full damages in both of the actions available to him. The reason for this is that the damages recoverable in each action to some extent overlap, and the rule prevails in admiralty as elsewhere in the law that no one may recover compensatory damages more than once."

In *Runyan v. Great Lakes Dredge and Dock Co.,* 141 F. 2nd 396, (CA 6), a seaman sued for damages and recovered a jury verdict which was paid. Several years later he sued to recover additional items as maintenance

and cure. In the first or damage suit Runyan had sought recovery of these same items. The Court of Appeals held:

> "The substance of appellant's claim in the present action is identical with that in the first action. He introduces in the present action three elements which were a part of the claims in the first suit.
>
> "While appellant had two causes of action, the matter which he litigated in the former suit is essential to a decision in the case at bar. Under these circumstances the proceeding is in the nature of splitting his cause of action and the rule applies that he who avails himself of a judgment for a part of an entire indivisible claim estops himself from maintaining an action upon any other part of it."

In *Ottinger v. Walling,* 335 Pa. 77, the plaintiff first sued under the Jones Act and at that trial proved his loss of wages, medical expenses and the fair value of his maintenance. He recovered a verdict which was paid. Thereafter he instituted a second suit under the general maritime law to recover his maintenance. The Supreme Court of Pennsylvania said:

> "Accordingly, the narrow question raised by these pleadings is whether the plaintiff in the trespass action under the Jones Act recovered the maintenance which he now seeks under the general maritime law. The defendants urge that the verdict in the prior suit embraced every item of damage that the plaintiff had sustained at the time of the trial, or that he might suffer in the future, including loss of past wages and maintenance, and loss of future earning power. The record in this case is decisive that the plaintiff is without right to recover. The same item of damage may not be recovered more than once, even though the subsequent proceeding may be upon a different right of action, because the prior judgment operates as an estoppel when the subject matter controverted and determined

is identical; *Rauwolf v. Glass,* 184 Pa. 237; *Bowers' Estate,* 240 Pa. 388; *People's Water Co. v. Pittston,* 241 Pa. 208; *Havir's Estate,* 283 Pa. 292."

Upon related subjects this Court has considered the questions of duplication of recovery and estoppel by judgment on a number of occasions. In *Tait v. Western Maryland Ry. Co.,* 289 U. S. 620, it said:

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action."

In the last cited case the Court held:

> "The petitioner may not escape the effect of the earlier judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing or significance of the facts, provided, as is the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment."

See also *United States v. Moser,* 266 U. S. 236; *State of Oklahoma v. State of Texas,* 256 U. S. 70; *Southern Pacific R. Co. v. United States,* 168 U. S. 1. The rationale of *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, clearly supports the proposition that an injury gives rise to but one cause of action and merely because recovery in different forums affords a different measure of recovery does not sanction a double recovery. Damages, like demurrage, "may be no more than fair indemnity when gains have been lost or enjoyment seriously disturbed", *Brooklyn Eastern District Terminal v. United States,* 287 U. S. 170 at 176.

This Court has held that the maintenance which the shipowner must pay to his seamen "is comparable to that to which the seaman is entitled while at sea". *Calmar v. Taylor,* 303 U. S. 528. The Petitioner attacks that holding because, he says, (brief 13) a different allowance is made to disabled seaman for maintenance ashore than is used for tax purposes when the same seaman is working and living aboard ship. It is not surprising that the cost is different. Anyone who has ever traveled knows full well that the cost of a hotel room and meals in a restaurant greatly exceeds their cost in his own home. Petitioner's argument would only be valid if every sick and injured seaman was fortunate enough to have his disability occur in his home port. The chance of that occurring is of course remote.

Maintenance ashore and board and lodging at sea should be comparable. From time immemorial the Courts have refused to allow seamen monetary recovery for maintenance during the period they were receiving actual maintenance in a hospital without expense. Petitioner asks to overthrow that rule as well as the rule of *Calmar v. Taylor, supra.* All that the Court below has done is apply the reasoning of those rules to the facts of the case at bar. In doing so it denied him double recovery—"twin beds and six meals a day" was the way the Court of Appeals phrased it. Its holding is eminently correct and the case does not merit review by this Court.

CONCLUSION.

The Petition should be denied.

Respectfully submitted,

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